Supreme Court of the United States

OCTOBER TERM, 1969

No. 1082

UNITED STATES OF AMERICA,

Appellant,

—v.—

THOMAS WILLIAM WELLER

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

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RELEVANT DOCKET ENTRIES

1969		
Jan.	15	Filed indictment
Feb.	18	Filed defendant's motion to dismiss indictment
Apr.	25	Filed defendant's memorandum in support of motion to dismiss
May	23	Filed government's answer in opposition to motion to dismiss
Sept.	19	Entered order granting motion to dismiss
Oct.	17	Filed government's notice of appeal

[Filed Jan. 15, 1969, C. C. Evensen, Clerk]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Criminal No. 42614

VIOLATION: Title 50 Appendix, U.S.C., Section 462—Refused to Submit to Induction.

UNITED STATES OF AMERICA, PLAINTIFF

v.

THOMAS WILLIAM WELLER, DEFENDANT

INDICTMENT

The Grand Jury charges: THAT THOMAS WILLIAM WELLER, defendant herein, on or about July 10, 1968, in the City of Oakland, County of Alameda, State and Northern District of California, did wilfully and knowingly fail and neglect to perform a duty required of him under and in the execution of the Military Selective Service Act of 1967, and the rules, regulations, and directions duly made pursuant thereto, in that he, having reported for induction as ordered by his Local Board, and having been found fully qualified for service, did then and there refuse to submit to induction into the Armed Forces of the United States.

A True Bill

/s/ J. Y. Tapley
Foreman

/s/ Cecil F. Poole
CECIL F. POOLE
United States Attorney

[Filed Feb. 18, 1969, C. C. Evensen, Clerk]

FRANCK & HILL
PETER FRANCK, ESQ.
2905 Telegraph Avenue
Berkeley, California 94705
Telephone: 845-4123

Attorneys for Defendant

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. 42614

UNITED STATES OF AMERICA, PLAINTIFF

vs.

THOMAS WILLIAM WELLER, DEFENDANT

MOTION TO DISMISS INDICTMENT (RULE 12)

TO THE UNITED STATES OF AMERICA, and to CECILE F. POOLE, Esq. Its attorney:

YOU AND EACH OF YOU, WILL PLEASE TAKE NOTICE that on the 11 day of March, 1969, or as soon thereafter as counsel can be heard, the defendant herein will move the court for its order dismissing the indictment heretofore rendered and filed herein, upon the grounds that:

1. There is no basis in fact for the denial of defendant's application for classification 1-O (Conscientious Objector);

2. Defendant's right to the due process of law as guaranteed by the Fifth Amendment of the Constitution of the United States has been denied to defendant in that:

a) The Administrative proceedings had prior to the issuance of an order to report for induction

completely failed to apprise the defendant of the standards and requirements being applied to the evaluation of his claim;

b) Defendant was denied the right to counsel in the administrative proceedings;

c) Defendnat [*sic*] was denied the right to present witnesses on his behalf; and

d) Defendant and this Court have been denied the right to make and present a record of the administrative proceedings herein.

This motion to dismiss, pursuant to Rule 12 of the Federal Rules of Criminal Procedure, will be based upon this Notice, upon Memorandum of Points and Authorities to be served herein, upon the files and records before this Court, and upon such evidence and arguments as may be adduced at the hearing hereon, or prior thereto.

DATED: February 17, 1969.

FRANCK & HILL

By /s/ Peter Franck
PETER FRANCK
Attorneys for Defendant

EXTRACTS FROM APPELLEE'S SELECTIVE SERVICE FILE
(EXHIBIT A TO MOTION TO DISMISS)

* * * *

(Registrant Will Make No Entries on This Page)

Dates	Minutes of Actions by Local Board and Appeal Board and on Appeal to the President	Vote Yes	Vote No
May 14 1964	Classified II-S	5	0
May 27 1964	SSS 110 Mailed		
Jul 21 1964	Student status form mailed		
Oct 29 1964	Classified II-S to 6/65	3	—
Nov 12 1964	SSS 110 Mailed		
Jul 5 1965	Student status form mailed, & letter		
Oct 27 1965	Classified IA	2	—
Nov 24 1965	SSS 110 mailed		
1-3-66	SSS Form 223 Mailed (Order to report for Phys. Exam.) 1-27-66		
3-1-66	Pending waiver		
3-30-66	DD form 62 mailed T. REJ. xxy 47 & 88 mailed to Hdq.		
Apr 13 1966	Classified I-Y	2	—
Apr 27 1966	SSS 110 Mailed		
Feb 20 1967	SSS Form 127 Mailed		
2-28-67	SSS Form 127 Received		
3-6-67	Form C-71 mailed.		
3-29-67	Form C-71 received.		
May 3 1967	SSS Form 223 Mailed (Order to report for Physical Examination) (5-22-67)		
6-14-67	Pending waiver [illegible]—case on appeal		
6-15-67	DD Form 62 mailed ACC		

Dates	Minutes of Actions	Vote Yes	Vote No
Jul 12 1967	Classification I-A	3	—
Jul 18 1967	SSS 110 & 217 Mailed		
Aug 4 1967	SSS 150 Mailed		
Aug 10 1967	SSS Form 150 Received		
8-17-67	Appeal Filed by Registrant		
9-13-67	Classification I-A (write letter re pers app)	3	—
Sep. 21 1967	SSS 110 & 217 Mailed		
10-18-67	Personal Appearance Requested by Registrant		
10-31-67	C-310 mailed to registrant. Personal Appearance scheduled for Nov. 8, 1967 at 1:00 P.M.		
11-8-1967	Pursuant to telephonic discussion between local board members on November 7, 1967 re: request of registrant through letter from Attorney, received November 6, 1967, Board took the action with respect to requests in Attorney's letter which action is set forth in Board's letter dated November 7, 1967 to Peter F. Franck. Contents of this letter were given orally by telephone to Mrs. Hermes, Attorney at Law, in Mr. Franck's office and letter was mailed this date. Board this date confirms the action set forth in letter of November 7th 1967, refuses to have Counsel present at Personal Appearance, refuses to have witnesses speak orally, on behalf of registrant at Personal Appearance and refuses to have stenographer present at proceedings at Personal Appearance.	3	—

Dates	Minutes of Actions	Vote Yes	Vote No
11-8-67	On pers. appearance. Hold for 10 days for further documents from Registrant. Pers. App. held this date	3	—
Dec. 1, 1967	Letter received from Attorney Peter Franck dated Nov. 30, 1967.		
12/13/67	Case Reviewed & I-A retained & case not re-opened. Board determines that oral witnesses will not be heard and that stenographic reporter will not be present. Classified I-A Send to Appeal Board	2	—
12-18-67	Letter mailed to registrant.		
Dec 21 1967	SSS 110 and 217 Mailed		
1-3-68	Letter rec'd from reg with appeal.		
1-10-67 [*sic*]	Case reviewed, not reopened & I-A is retained Send to App. Bd. The I-A was given this Reg. 9-13-67 & we are not required to give a new I-A now	3	—
1/24/68	Mailed C-140 to Registrant		
1/24/68	Complete file forwarded to Appeal Board. SSS 120 attached.		
5-22-68	Classified I-A by the Appeal Board	4	0
5-23-68	Complete file received from the Appeal Board		
May 31 1968	SSS Form 110 Mailed		
6-14-68	SSS Form 252 and DD Form 398 Mailed (Order to Report for Induction) (7-10-68)		

	Minutes of Actions	Vote Yes	Vote No
7-19-68	Letter received from Armed Forces Examining and Entrance Station Registrant refused to submit for Induction.		
7-24-68	Complete file forwarded to State Headquarters for review and determination whether to report to the U.S. Attorney as a delinquent.		
8-9-68	Complete file returned from State Headquarters with authority to report to United States Attorney as a delinquent on SSS Form 301		
8-20-68	SSS Form 301 mailed (Delinquent Registrant Report) to United States Attorney.		
9-19-68	Cover sheet and complete file forwarded to State Headquarters per request of September 18, 1968. SSS Form 1 affixed.		

* * * *

[Received Oct. 18, 1967, Sacramento Local Board Group]

PETER F. FRANCK
Attorney at Law
2890 Telegraph Avenue, Berkeley 5, California

JEANETTE A. HERMES

THornwall 5-4123

FRANCIS HEISLER
Of Counsel

October 17, 1967

Selective Service System
Local Board No. 22
Post Office Building, Rm. 423
8th and I Streets
Sacramento, California 95814

re: Thomas W. Weller
SS No. 4 22 44 351

Gentlemen:

Pursuant to the notice contained in your Form 217, enclosed please find my client's request for a personal appearance before your board.

I will appreciate it if you will inform me as to the time and place of said hearing.

Very truly yours,

/s/ Peter Franck
PETER FRANCK

PF:h
Encl.

CERTIFIED MAIL—RETURN RECEIPT
SPECIAL DELIVERY.

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October 16, 1967

Selective Service System
Local Board No. 22
Sacramento, California

Gentlemen:

I wish to request an appointment for a personal appearance before your board with regard to my seeking classification as a conscientious objector.

Sincerely,

/s/ Thomas W. Weller
THOMAS W. WELLER
Selective Service No.
4-22-44-351

SELECTIVE SERVICE SYSTEM

Local Board No. 22
Federal Building, Room 423
801 I Street
Sacramento, California 95814

(Local Board Stamp)

October 31, 1967

Thomas W. Weller
2990 Adeline Avenue
Berkeley, California

SS No. 4 22 44 351

Dear Sir:

Your request for a personal appearance before your local board is acknowledged.

We have made an appointment for you to appear before your local board at the address given above at 1:00 p.m. on November 8, 1967.

Section 1624.2 (b) of the Selective Service Regulations provides that "At any such appearance, the registrant may discuss his classification, may point out the class or classes in which he thinks he should have been placed, and may direct attention to any information in his file which he believes the local board has overlooked or to which he believes it has not given sufficient weight. The registrant may present such further information as he believes will assist the local board in determining his proper classification. *Such information shall be in writing, or, if oral, shall be summarized in writing by the registrant* and, in either event, shall be placed in the registrant's file."

BY DIRECTION OF THE
LOCAL BOARD

/s/ Idahleen Thompson
Clerk

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[Received Nov. 6, 1967, Sacramento Local Board Group]

PETER F. FRANCK
Attorney at Law
2890 Telegraph Avenue, Berkeley 5, California

JEANETTE A. HERMES — THornwall 5-4123

FRANCIS HEISLER
Of Counsel

Selective Service
Local Board No. 22
Post Office Bldg. Rm. 423
8th & I Streets
Sacramento, California
95814

Re: Thomas W. Weller
SS. No. 4 22 44 351

Dear Sirs,

My client, Mr. Thomas Weller informs me that you have sent to him a notice of time and place for his personal appearance before your board. Please have reference to my letter of October 17, 1967, wherein I requested that you forward said notice to this office.

Mr. Weller has requested that I be present at the hearing, along with his witnesses, to advise him with respect to his rights.

Further, he wishes to bring with him to the hearing several people who are well acquainted with him to speak to you on his behalf, in support of the sincerity and conscientiousness of his opposition to war. I have advised Mr. Weller of the importance of making a good record of the proceedings, and he requests that, in order that he be able to concentrate his attention on giving your Board members the best possible understanding of his position, he be permitted to bring with him a stenographer to record the proceedings, for the benefit of his records, and to aid the deliberations of the appeal board, in the event that should become necessary.

In view of the fact that Mr. Weller's witnesses, recorder, and legal advisor will have to travel to Sacramento for the hearing, it is requested that you grant permission for their attendance at the hearing in advance.

Thank you very much for your consideration in this matter.

Very Truly Yours,

/s/ Peter Franck
PETER FRANCK

Local Board No. 22
Federal Building, Room 423
801 I Street
Sacramento, California 95814

November 7, 1967

Mr. Peter F. Franck
Attorney at Law
2890 Telegraph Avenue
Berkeley 5, California

Dear Sir:

It appears from your written request, undated, that Thomas W. Weller, SSS No. 4-22-44-351, has requested the following to be accomplished at his Personal Appearance, on November 8, 1967.

(1). That Mr. Peter F. Franck be present at the hearing as his attorney.

(2). That witnesses also be present to speak in his behalf.

(3). That a stenographer to record the proceedings be present.

Under Section 1624.1 (b), of the Selective Service Regulations it states in part **And provided further, that no registrant may be represented before the local board by anyone acting as attorney or legal counsel, therefore request No. 1 above is refused.

With respect to request No. 2, the local board has exercised its discretion and decided that it will not hear witnesses at this Personal Appearance. These witnesses should submit their testimony in writing and it will be considered by the board.

Under Section 1624.1 (b), of the Selective Service Regulation states in part. No person other than a registrant shall have the right to appear in person before the local board, but the local board may, in its discretion, permit any person to appear before it with or on behalf of a registrant**.

If at the Personal Appearance the Board feels there is any reason to hear witnesses, it will so advise the registrant and will set a further date for such purpose.

With respect to request No. 3, the Board in exercising its discretion denies the request to have a stenographer to record the proceedings.

Under Section 1624.2, Appearance before Local Board, of the Selective Service Regulation, paragraph (b) states in part **Such information shall be in writing, or if oral, shall be summarized in writing by the registrant, and in either event, shall be placed in the registrant's file.**

You may advise Mr. Weller to come prepared with a written summary of the oral points he wishes to raise at the Personal Appearance. It will be filed and considered along with his oral statements at the Personal Appearance.

Respectfully,

/s/ Ralph T. Lui
R. T. LUI, Chairman
Local Board No. 22

rl/it
cc: Thomas W. Weller
Above telephoned to Mrs. Hermes, this date

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[Received Nov. 8, 1967, Sacramento Local Board Group]

Local Board No. 22
Federal Building, Room 423
801 I Street
Sacramento, California 95814

November 8, 1967

PERSONAL APPEARANCES

SUBJECT: WELLER, Thomas W.
SS No.: 4 22 44 351

Registrant appeared for his personal appearance before the Local Board members at the address given above on November 8, 1967. Board members present: Mr. Ralph T. Lui, Chairman, Mr. Frank Goldstein, Secretary and Mr. Alfred I. Scott, member.

Registrant stated he doesn't belong to any church, has arrived at his beliefs independently, entire world governed by a profound religious principle. Registrant stated:

"There is a certain kind of person I want to be and there are certain things I can't do and be that person. One thing is to be part of organized violence, army is that sort of thing and I can't be in that sort of thing. An Army follows its orders. It is organized to kill at random and not to make moral judgements."

"I could not kill unless I could make a moral judgement in each instance."

"I couldn't serve as a Medic. At some point, I have to take a stand and I can't be part of the Army."

"I could imagine that circumstances could arise that I could use violence in a certain case and my moral sense would permit me to use it, but in the Army I would be obligated to use violence in all cases whether my moral judgement would permit me or not. In the Army one implicitly accepts the use of violence and this is essential

to the nature of serving in it in a combatant or non-combatant capacity."

Registrant was read above in quotes and agrees it is substantially okeh.

Registrant stated: "Where my beliefs come from, I don't know. I have in my mind this intuitive idea, mystical, of what sort of a person I have to be. I attribute that idea to a religious source. I don't think the source of religion is written down, for me at least, or in any religious body. It is inherent in what I see around me in the world and how I feel about it. I feel that this feeling is deep and I'd go to jail if necessary."

Registrant was read above in quotes and agrees it is substantially okeh.

The registrant was advised that he has ten days to get in his written summary of his oral presentation and to send in letters from persons who wish to give information as to his beliefs.

We would then decide whether further oral witnesses would be permitted.

• • • •

[Received Nov. 15, 1967, Sacramento Local Board Group]

PETER F. FRANCK
Attorney at Law
2890 Telegraph Avenue, Berkeley 5, California

JEANETTE A. HERMES

THornwall 5-4123

FRANCIS HEISLER
Of Counsel

November 14, 1967

Mr. R. T. Lui, Chairman
Local Board No. 22
Federal Building, Room 423
8th and I Streets
Sacramento, California 95814

Re: WELLER, Thomas W.
SS No. 4 22 44 351

Dear Mr. Lui:

Thank you for your letter of November 7, 1967, in the captioned matter. With regard to request No. 1, the right to counsel, I would like to make two points for your consideration.

In the first place, I propose to be present to advise my client as to his rights, and to aid him in any way I could with his presentation of his case to your board. This function is quite distinct from that of *representation* which is all that the cited regulation bars. "No registrant may be represented before the local board . . .".

Second, and of very great importance, is the fact that the cited regulation was drawn and enacted at a time when the law provided for full field investigation of concientious objector claims by the FBI, followed by a detailed review by the Justice Department, including a hearing before a trained hearing officer in which counsel was allowed and witnesses were heard and a record was

made. As you know, recent amendments to the Selective Service Act have eliminated the latter procedure. The appearance before the local board is now the one and only time wherein a registrant may have any kind of a hearing, present his case in person, present testimony on his behalf, and meet his accusers, in the sense that he may determine the reasons for prior denial of his claim.

The Supreme Court of the United States had many occasions in recent years to construe the due process requirements of the Constitution with respect to the question of the right to counsel, and every case has upheld that right where the proceeding involved a matter of the liberty and substantial personal rights of the individual. Clearly, this is such a case.

In view of the substantially changed circumstances, I think it would be advisable for all parties if you would determine whether the Selective Service System has made a determination of the validity of the prior requirement with regard to exclusion of counsel.

With respect to what you refer to as request No. 2, I would like to point out that one of the factors which your board should be considering most carefully at such a hearing is the registrant's sincerity. I do not feel that there is any basis for assuming that sincerity can be judged as well from the written word of the witness as from the oral presentation. Therefore, I would respectfully inquire as to the basis of the exercise of the board's discretion in this matter.

With respect to your citation of Regulation No. 1624.2, while this authorizes the registrant to summarize the information he provides, it does not provide for recording of other aspects of the proceedings, including questions and remarks by the members of the board. It is difficult for me to understand why this regulation is construed to bar what is obviously a preferable procedure for making a record, so long as the registrant is willing to bear the extra cost.

I would hope that your board would consider these matters of constitutional due process very seriously, ob-

tain appropriate guidance from the Selective Service System, and the Justice Department, and very seriously consider our request that you grant my client a hearing in which the requirements of due process are met.

Thank you for your attention.

Very truly yours,

/s/ Peter Franck
PETER FRANCK

PF:mw

Local Board No. 22
Federal Building, Room 423
801 I Street
Sacramento, California 95814

November 17, 1967

Mr. Peter F. Franck
Attorney at Law
2890 Telegraph Avenue
Berkeley 5, California

Subject: Weller, Thomas William
SS No.: 4 22 44 351

Dear Sir:

With reference to your letter of November 14, 1967, I call your attention to the fact that at the registrant's personal appearance on November 8, 1967, he was advised that he had ten days from November 8, 1967 to submit the written statements of his witnesses to us. Also, registrant's attention was called to the Form C-310 notice mailed to him on October 31, 1967, which states in part; "Section 1624.2 (b) of the Selective Service Regulations provides that, 'At any such appearance, the registrant may discuss his classification, may point out the class or classes in which he thinks he should have been placed, and may direct attention to any information in his file which he believes the local board has overlooked or to which he believes it has not given sufficient weight. The registrant may present such further information as he believes will assist the local board in determining his proper classification. Such information shall be in writing, or, if oral, shall be summarized in writing by the registrant and, in either event, shall be placed in the registrant's file'." The registrant did not come with the written summary referred to therein, so was asked to submit this within the ten day period.

The registrant, under date of November 14, 1967, has submitted two letters of witnesses, but has not submitted written summary, which he was privileged to submit. While his failure to submit such written summary will in no way draw any detrimental inferences by this board,

I call this omission to your attention so that he may supply us with such a summation if he desires.

Your current letter of November 14, 1967, proceeds on an assumption that this board has continued the personal appearance to a further date beyond November 8, 1967, the day on which it was held. This assumption is incorrect. The personal appearance was afforded the registrant on November 8, 1967 and this board has merely postponed for ten days, its review of the case pending receipt of the written documents referred to herein. The board has held open the determination as to whether oral presentation of witnesses will be permitted, until after its examination of the written statements. The meeting at which this determination will be made is not part of the personal appearance of the registrant, but is part of the review by the board of the case after the personal appearance, during which review the registrant is not present.

If at this review a determination is made to permit oral testimony, we will at that time inform you as to the board's decision relative to your request in your letter of November 14, 1967. If the board's determination is not to permit the taking of oral testimony, your request to be present then becomes moot.

We are extending the time within which to submit any further written matters for our review, to December 7, 1967, after which we will review the file as set forth herein.

Yours very truly,

FOR THE BOARD

/s/ Ralph T. Lui
RALPH T. LUI, Chairman
Local Board No. 22

[Received Dec. 1, 1967, Sacramento Local Board Group]

PETER F. FRANCK
Attorney at Law
2890 Telegraph Avenue, Berkeley 5, California

JEANETTE A. HERMES

THornwall 5-4123

FRANCIS HEISLER
Of Counsel

November 30, 1967

Local Board No. 22
Federal Building, Room 423
801 I Street
Sacramento, California 95814

Re: WELLER, Thomas William
SS No. 4 22 44 351

Dear Sirs:

Enclosed please find the original summary of my client's hearing before your Board. If this summary is in any way incorrect, I will appreciate it if you will so notify us within seven days so that we may correct the record.

In submitting this material, we in no way waive the previous request made for a hearing wherein the basic performance of due process of law are observed.

In matters such as this one, these are not mere empty formalities. There is a great and probably growing gap between the generations in our Nation. Communication across this line is difficult under the best of circumstances. Young people do not use the same words and language, or, when they do they may mean quite different things. In a period when they feel an increased alienation from the formal institutions of our society, to ask them to communicate their deep and heartfelt beliefs through cold, formal, letters, is unrealistic. Only through

a real hearing where there is an opportunity for a registrant and his friends to come and together attempt to communicate with you the beliefs they hold deeply and strongly can there be any hope of real communication. Without real communication there [*sic*] constitutional rights to a fair hearing cannot be vindicated.

I trust you will seriously consider these matters.

Very truly yours,

/s/ Peter Franck
PETER FRANCK

PF:mw
Enclosure

The Spokesman or Chairman of the board explained that he had gotten the letter requesting that I be allowed to have an attorney, witnesses, and a stenographer present at the hearing, and that he had talked to Mrs. Hermes on the telephone. He explained the board's reasons for denying those requests, and gave me a copy of a letter setting forth those reasons. He suggested that I could have the witnesses that I had wanted to be present send letters to the board, and that the board would delay its decision "a week or ten days" for that purpose. He said that their function there was to try to form an idea of what my ideas were like and what kind of a person I was through an informal conversation; that they would not be asking any trick questions or trying to change my mind; that they would permit me to "carry the ball" as regards to what I felt I should tell them.

I asked them what they thought were valid grounds for conscientious objection, and whether they thought that certain sorts of religious beliefs and background were necessary and what they were.

The spokesman replied that it was not their function to judge such legal questions.

I said that I felt that I was, as a CO, necessarily involved with those questions, whether they were or not.

The spokesman repeated some of his earlier statements about how the board operated, and said that while it was probably a clearer case in type case [*sic*] of a Jehovah's Witness or similar religious affliations, in a case like mine, they were faced with a more difficult problem.

I said that it must be difficult to judge the sincerity or depth of belief of a person with beliefs of his own making, as opposed to a person of a conventional religious affiliation, but that the two beliefs might well be equally real, to which the board members indicated assent.

I then said that I could perceive within myself an image of the sort of person that I should be and that this image was inconsistent with the sort of person military service would require me to be. People in the military service prepare, train, and equip themselves for killing and violence, and must accept as their own the goals of the military organization, namely, killing and violence. I stated that I could never take the step of accepting those goals and that way of life by becoming a part of a military organization, even as a non-combatant member.

The chairman asked at that point if I was really familiar with the nature of the medics. He explained that medics in the field need not accept orders from the combat command if such orders violated their non-combatant status, and that in fact medics were not permitted to carry guns.

I replied that going in the service even in such a case required pledging one's loyalty to an organization whose goals were violent ones and implicitly accepting those goals thereby.

The spokesman said that he wanted to get as clear as possible an idea of my views on whether violence was ever justifiable, and as I spoke he attempted to briefly paraphrase what I said, repeatedly asking me if his paraphrase was substantially correct, and writing down his paraphrase.

I stated that violence would conceivably be justifiable to me in a situation where the effect and its goal were

perfectly clear, that is, in a situation where I could see the danger, and exactly what measured use of force would stop it. This is different from war where, while the means are generally agreed to be evil, the effect of the application of these means and the goal are uncertain and very different from the institution of the army where the soldier necessarily accepts the idea of training and preparing himself to use violence *whatever* the goal. The soldier accepts orders from whoever is in power whether it be a Johnson or a Hitler, not caring about the purpose.

The spokesman then asked if there was any more I had to say, adding that he had to ask that question of everyone so as to be sure they got a fair hearing.

I said that I would like to say more about the origins of my beliefs. The spokesman carefully paraphrased and recorded this part also, as above.

I stated that I was not certain of the origin of my beliefs and their religious nature, but that I was certain of their depth. Religion for me is no [*sic*] in written revelation or in organized religious bodies. It comes from my living in the world, and what I feel about it. It gives me an intuitive feeling of what I want to be like and I feel I must live up to it. There is no way to communicate to you whether this feeling is shallow or deep, but I know that it is deep enough that I would go to jail for it.

A board member asked, since I stressed the importance of knowing the danger and how a given application of force would stop it in determining whether violence was justified, that if I knew what President Johnson knows, might I not do the same?

I assured him that if I were in Johnson's position, I wouldn't maintain an army, much less a war.

He suggested that that was essentially the case at the time of Pearl Harbor, when we were "caught with our pants down".

I pointed out that if we had not had a military base at Pearl Harbor, the Japanese would not have bombed it. I then attempted to make it clear that I categorically

denied the possibility of knowing when violence was justified in the arena of world history. No one ever really knows enough to say, "if we don't do A, B will happen". So in essence, it is a matter of trading a certain evil for a possible evil. There has never been enough justification for unleashing the terrible distate [*sic*] of war on the world.

At this point we mutually agreed to end the proceedings.

The foregoing is as accurate a reconstruction of my hearing as I can make from memory.

/s/ Thomas W. Weller
THOMAS W. WELLER

DATED: November 30, 1967

Local Board No. 22
Federal Building, Room 423
801 I Street
Sacramento, California 95814

4 22 44 351

December 13, 1967

Mr. Thomas W. Weller
2990 Adeline Avenue
Berkeley, California

Dear Sir:

From examination of entire case, board determines that permission is denied to present oral witnesses on behalf of registrant. Registrant having been afforded opportunity to present letters of witnesses and a summary of personal appearance, the board this date has reviewed the case, has not reopened same, and retains registrant in his present 1-A classification.

Yours very truly,

FOR THE BOARD

/s/ Ralph T. Lui
RALPH T. LUI, Chairman
Local Board No. 22

cc: Mr. Peter F. Franck

• • • •

[Received Dec. 28, 1967, Sacramento Local Board Group]

PETER F. FRANCK
Attorney at Law
2890 Telegraph Avenue, Berkeley 5, California

JEANETTE A. HERMES

THornwall 5-4123

FRANCIS HEISLER
Of Counsel

December 27, 1967

Ralph T. Lui, Chairman
Local Board No. 22
Federal Building, Room 423
801 I Street
Sacramento, California 95814

Re: WELLER, Thomas William
SS No. 4 22 44 351

Dear Mr. Lui:

I am in receipt of your letter of December 13, 1967, in the captioned matter.

Please note that on behalf of my client, I make exception to the actions taken by your board as contrary to law and Selective Service regulations and that it is not justified under the circumstances. I ask that you reconsider these actions.

Whether or not you reconsider these actions, I wish to draw your attention to the faut [*sic*] that your action in "not reopening" and "retaining" the registrant in his present 1-A classification is incorrect and inappropriate under the circumstances. Where a claim for conscientious objection is presented, and the board determines not to grant 1-O classification, it must take a new classification action, albeit, classifying into the samd [*sic*] 1-A classification. To fail to do so would appear to be noth-

ing other than an attempt to prevent the registrant from exercising his right to appeal from your board's decision. It is requested that you take the appropriate action.

On behalf of Mr. Weller, please take notice that he hereby appeals from your decision, both as to the procedural matters which we have raised and as to the denial of the classification 1-O.

Very truly yours,

/s/ Peter Franck
PETER FRANCK

PF:mw

[Received Jan. 3, 1968, Sacramento Local Board Group]

December 29[?], 1967
[date not clearly legible]

Selective Service System
Local Board No. 22
Sacramento, California

Dear Sirs:

I have recieved [*sic*] your letter of December 13. I appeal to the Appeals Board from your decision not to classify me 1-O, and from your decision denying me the right to present witnesses before you, to make a record of your proceedings, and to have counsel present.

Sincerely,

/s/ Thomas W. Weller
THOMAS W. WELLER
SS No. 4-22-44-351

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[Filed Sep. 19, 1969, C. C. Evensen, Clerk]

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. 42614

UNITED STATES OF AMERICA, PLAINTIFF

vs.

THOMAS WILLIAM WELLER, DEFENDANT

ORDER GRANTING MOTION TO DISMISS INDICTMENT

The Defendant has made a motion to dismiss the indictment against him pursuant to Fed. R. Crim. P. 12. Defendant contends that his constitutional rights were violated because his request to have his attorney present during the personal appearance on his conscientious objector claim was denied pursuant to 32 C.F.R. § 1624.1 (b) which provides:

> . . . no registrant may be represented before the Local Board by anyone acting as attorney or legal counsel.

Alternatively, the defendant contends that the section of 1624.1(b) quoted above is not authorized by the Selective Service Act of 1967, 50 U.S.C.A. App. § 451, et seq.

The pertinent facts, which are apparent from the Defendant's Selective Service file, are as follows: The Defendant requested, received and filed with his local board a Form 150 (Special Form for Conscientious Objector). The board classified the Defendant I-A and the Defendant requested a personal appearance. The Board scheduled the appearance for November 8, 1967. The Board received a letter from the Defendant's attorney on November 6, 1967 which requested that the board grant Defendant's attorney permission to be present at the personal appearance to advise him with respect to his rights. Relying on 32 C.F.R. § 1624.1(b), the board denied the requested permission. Following the hearing, the Defendant's board declined to reopen his case and retained him in class I-A. The Defendant then unsuccessfully appealed this classification.

There is no question that the hearing before the local board on a registrant's claim for conscientious objector status is a critical stage of an administrative process at which substantial rights are adjudicated. The failure to sustain one's claim can result in requiring a registrant to serve his country in a manner different both in type (a I-A-O serves in the armed services in a non-combatant capacity) and in hazard (a I-O performs non-military alternative service in the national interest).

In *Greene* v. *McElroy*, 360 U.S. 474, (1959), the Supreme Court held that the administrative denial of traditional forms of fair procedure, particularily where substantial constitutional doubts are raised, are not to be presumed to be authorized "by implication or without the most explicit action by the Nation's lawmakers, even in areas where it is possible that the Constitution presents no inhibition." The *Greene* case dealt with the administrative withdrawal of security clearance causing the plaintiff's loss of a job in private industry, and the procedural safeguards which were missing were the right to confrontation and cross-examination of those who gave information adverse to Mr. Greene. Certainly, failing to establish a conscientious objector claim is as serious as the impact of loss of the right to have access to classified information (hardly what most people would consider to be a "right"). The right to counsel is also a traditional safeguard, and the only apparent reason it was not dealt with in *Greene* is because Mr. Greene was represented by counsel in all of his proceedings. Indeed, of what value would be the right to confrontation and cross-examination without the right to counsel skilled in those arts? It seems clear that the affirmative denial of the right to be represented by retained counsel, even in a "civil" proceeding, where substantial loss of liberty may be at stake, is subject to grave constitutional doubts. *In re Gault*, 387 U.S. 1 (1967).

In spite of the fact that the *Greene* court did not decide that the plaintiff had a *constitutional* right to confrontation and cross-examination, the court held that plaintiff had such rights because the "Nation's lawmakers" did not *explicitly* authorize their withdrawal by the Defense Department. Accordingly, in the case at bar,

the only "lawmakers" who could explicitly authorize the denial of counsel in hearings before the local draft boards are Congress, not the President, since the President could not raise an army, through induction, without the authority of Congressional legislation.[1] However, nowhere in the Act has Congress expressly denied the right to counsel or expressly delegated the power to do so to the President. The only possible sources of such a delegation are Section 1(c) which states that service should be "in accordance with a system of selection which is fair and just. . . .," and section 19(b)(3) [*sic:* should read "10(b)(3)"] which provides "such local boards . . . shall, under rules and regulations prescribed by the President, have the power . . . to hear and determine . . . all questions and claims with respect to . . . exemption. . . ." These sections clearly are not "explicit action by the Nation's lawmakers" (in this case Congress) taking the constitutionally-suspect action of removing the right to be represented by counsel.

In *Greene* the argument was made that delegation of the power pruning the traditional procedural rights should be found because of Congressional and Presidential acquiesence in the program. The court dismissed the contention as follows:*

> If acquiescence or implied ratification were enough to show delegation of authority to take actions with-

[1] While under Article 2 § 2 of the Constitution the President is Commander in Chief of the Armed Forces (See *Cafeteria Workers* v. *McElroy*, 367 U.S. 886), under Article 1 § 8, Congress, not the President, (See *Swaim* v. *United States*, 28 Ct. Cl. 173, *Aff.* 165 U.S. 553 (1893); 6 Op. Atty. Gen. 10 (1853)), is given the power to provide for the common defense, to declare war, to raise and support armies, to provide and maintain a navy and to make all laws necessary and proper for the execution of those powers. It is pursuant to these Congressional powers that the Selective Service Act of 1967 was passed, and it was obviously upon the premise that only Congress could raise an army that Congress found it necessary to authorize the President "to select and induct into the Armed Forces of the United States for training and service in the manner provided in this title, . . such number of persons as may be required to provide and maintain the strength of the Armed Forces." 50 U.S.C.A. App. § 454(a).

* 360 U.S. at 506, 507.

> in the area of questionable constitutionality, we might agree with respondents that delegation has been shown here. . . . We deal here with substantial restraints on employment opportunities of numerous persons imposed in a manner which is in conflict with our long-accepted notions of fair procedures. Before we are asked to judge whether, in the context of security clearance cases, a person may be deprived of the right to follow his chosen profession without full hearings where accusers may be confronted, it must be made clear that the President or Congress, *within their respective constitutional powers*, specifically has decided that the imposed procedures are necessary and warranted and has authorized their use. . . . Such decisions cannot be assumed by acquiescence or non-action . . .. They must be made explicitly not only to assure that individuals are not deprived of cherished rights under procedures not actually authorized . . . but also because explicit action, especially in areas of doubtful constitutionality, requires careful and purposeful consideration by those responsible for enacting and implementing our laws. Without explicit action by lawmakers, decisions of great constitutional import and effect would be relegated by default to administrators who, under our system of government are not endowed with authority to decide them.
> [Emphasis added.]

Greene, therefore, is persuasive authority for the proposition that 32 C.F.R. § 1624.1(b) is not authorized by the statute.

Six years prior to *Greene* the Supreme Court decided *United States* v. *Nugent*, 346 U.S. 1 (1953) (5-to-3 decision). The defendant contended that the requirement of a "hearing" under the then-existing section 6(j) of the Selective Service Act meant that he should be entitled to cross-examine those who gave statements to the F.B.I. deliterious [*sic*] to his claim. The Court denied this claim, feeling that the "6(j) hearing" was not a "determinative" one and that there was "no time" for "litigious

interruption." The first reason is not applicable to our situation because now the hearing before the board is determinative. Reason two is not persuasive and was not followed in *Greene*. If litigious delays of potential members of the armed forces are of concern, *a fortiori* such delays regarding those already in the service are of equal if not greater concern. Yet, counsel participate in hearing with respect to members of the army who claim conscientious objector status. Army Regs. 635-20, para. 4(d) (Jan. 22, 1969). Finally, *Nugent* was not a "right to counsel" case, and the governmental interest in protecting sources of confidential information is more compelling that [*sic*] preventing a possible slight delay caused by the presence of retained counsel at a registrant's personal appearance. Indeed, counsel was permitted to participate in the "6(j) hearings". *Storey* v. *United States*, 370 F.2d 255 (9th Cir. 1966).[2] As Mr. Justice Frankfurter so eloquently stated in his dissent:

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[2] It is interesting to note that following the *Greene* case President Eisenhower, in Executive Order 10,865, set up a security clearance procedure which included the opportunity to be represented by counsel. Exec. Order No. 10,865, 25 Fed. Reg. 1583 (1960), as amended in 3 C.F.R. § 512 (1968). The *Nugent* case was subsequently followed in *Gonzales* v. *U.S.*, 364 U.S. 59 (1960). Petitioner claimed denial of due process because he was denied, at trial, the right to have the Justice Department hearing officer's report, as well as the original report of the F.B.I. The Court rejected this claim, holding that neither was relevant at trial as the case "centered entirely on the Department's recommendation, which petitioner repudiated, but which both the appeal board and the court below found supported by the record." 364 U.S. at 64. Although "following" Nugent, the Court concluded that: "This is not to say that there might not be circumstances in a particular case where fairness in the proceeding would require production. *No such circumstances, as foundation for a claim of actual unfairness, are before us.*" 364 U.S. at 65. [Emphasis added.] Therefore, the holding in *Gonzales* is not persuasive in deciding the case at bar, because it was based wholly on the Court's conclusion that the facts demonstrated that Gonzales suffered no unfairness due to the denial of production of the documents. The reasoning of the *Greene* court, to the contrary, is much like the present case, because the possibility of unfairness to petitioner Greene—certainly no greater than to defendant Weller—led the Court to hold that the denial of traditional safeguards was not to be inferred, but rather required explicit authorization.

> Considering the traditionally high respect that dissent, and particularly religious dissent, has enjoyed in our view of a free society, this Court ought not to reject a construction of congressional language which assures justice in cases where the sincerity of another's religious conviction is at stake, and where prison may be the alternative to an abandonment of conscience. *The enemy is not yet so near the gate that we should allow respect for traditions of fairness, which has heretofore prevailed in this country, to be overborne by military exigencies.*
> 346 U.S. at 12, 13. [Emphasis added.]

The right to counsel has been considered increasingly important in recent years. Indeed, the Supreme Court has held it to be such a fundamental right that even in juvenile proceedings, supposedly non-adversary, the youth has a constitutional right to counsel of his own:

> The juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it. The child 'requires the guiding hand of counsel at every step in the proceedings against him.'
>
> *In re Gault, supra.*, at 36. [Citations omitted.]

Even though the right to counsel has been so considered, lower federal courts have consistently taken the position that there is no right to be represented by retained counsel at Selective Service hearings. *Nickerson* v. *United States*, 391 F.2d 760 (10th Cir.), *cert. denied* 392 U.S. 970 (1968); *United States* v. *Dicks*, 392 F.2d 524 (4th Cir. 1968); *United States* v. *Capson*, 347 F.2d 959 (10th Cir. 1965); *Tantash* v. *United States*, 409 Fed. 2d 227 (9th Cir. 1969); *Haven* v. *United States*, 403 Fed.2d 384 (9th Cir. 1968). In most of the cases in which the matter has been raised, the courts have either dismissed it with no discussion, placed their reliance on the fact that the personal appearance of the registrant before the board is not at a criminal proceed-

ing within the ambit of the 6th Amendment, or held that failure to request counsel deprived the registrant of standing to raise the issue. (E.g., *Haven, supra.*) In still other cases the Court's language has merely been dictum. See *Tantash, supra; Haven, supra.* No case cited to the Court by the government or found by this Court has addressed itself to the apparent lack of specific authorization in the Selective Service Act for the denial of counsel before the local boards.

The often-abbreviated and sometimes-cryptic treatment of this traditional procedural safeguard has persisted in spite of the many significant procedural developments in other areas of the law. While conscientious objector status may be a "privilege" and not a "right" (See *Uffelman* v. *United States*, 230 F.2d 297 (9th Cir. 1956)), it is now established that the government may not distribute its largesse in a manner which ignores traditional procedural safeguards. Although the issuance of a liquor license would hardly be considered by most a "right", nevertheless an applicant for a liquor license has far more procedural rights than a Selective Service registrant whose life may ultimately be placed in jeopardy. See *Hornsby* v. *Allen*, 326 F.2d 605 (5th Cir. 1964). Likewise a welfare recipient has more procedural rights than a Selective Service registrant, see *Kelly* v. *Wyman*, 294 F.Supp. 893 (S.D. N.Y. 1968) (three judge court), as does an applicant for admission to the bar. See *Willner* v. *Committee on Character & Fitness*, 373 U.S. 96 (1963). In the area of juvenile proceedings the arguments that a juvenile has a right "not to liberty but to custody," that proceedings are "civil" rather than "criminal", and that the proceedings are non-adversary were advanced in order to justify elimination of the right to counsel. Although the constitutionality of the juvenile court laws had been upheld in over 40 jurisdictions, nevertheless the Supreme Court rejected these justifications. *In re Gault, supra.* When the reasoning of the Gault case was advanced in the selective service context, one court of appeals cited two pre-*Gault* court of appeals cases and one 1911 Supreme Court case dealing with abridgment of freedom to con-

tract to hold "it is well settled that there is no Constitutional right to counsel in administrative proceedings under the Selective Service Act." *United States* v. *Dicks*, *supra*. The court so decided despite the fact that the vague standards, burdensome volume, and restricted review in the Selective Service System cases lend themselves to precisely the same kind of abuse which Dean Pound in 1937 found should be surrounded by more formal procedural safeguards and the Supreme Court in 1967 held required the right to counsel. *Gault*, *supra* at 18-19. See also Report of the National Advisory Commission on Selective Service.[3] It has even been held that in small claims proceedings which are clearly "civil" and may even be classified as "de minimus" [*sic*], the right to have counsel make a meaningful appearance somewhere in the proceedings cannot be withdrawn. *Mendoza* v. *Small Claims Court*, 49 C.2d 668, 321 P.2d 9 (1958); *Prudential Ins. Co.* v. *Small Claims Court*, 76 C.A. 2d 379, 173 P.2d 38 (1946).

Cases such as *In re Groban*, 352 U.S. 330 (1957) (5-to-4 decision) and *Madera* v. *Board of Educ.*, 386 F.2d 778 (2nd Cir. 1967), *cert. denied*, 390 U.S. 1028 (1968), do not compel a different result. In the *Groban* case it was held that a witness was not entitled to be assisted by retained counsel when giving testimony before a Fire Marshal. In *Madera* a parent and child were denied permission to be represented by counsel at a guidance conference involving their child pursuant to a Board of Education Regulation. If a person is not entitled to be represented by counsel before a Fire Marshal, before a Grand Jury or before guidance counselors, it is because these proceedings are preliminary in nature and in no way result in a final adjudication. *Madera*, *supra* at 788; *In re Groban*, *supra* at 334. If a charge imperiling an individual's liberty were to arise from one of these hearings, a trial would ensue at which the government would have the burden of proof, and the defendant, with the aid of counsel, could attack the substance of any conclusions tentatively reached at the preliminary hear-

[3] Government Printing Office (1967).

ing which resulted in the charge. The *Madera* court's reliance on the failure of the court in *Dixon* v. *Alabama State Bd. of Educ.*, 294 F.2d 150 (5th Cir. 1961) to add right to counsel to its outline of a fair proceeding prior to suspension of a student is misplaced, since the plaintiffs in their pleadings did not request the right to counsel. *Dixon, supra* at 151, n.1. Furthermore, to the extent that the *Madera* case relies on Selective Service cases for authority it is for present purposes circular.

In contrast to the preliminary nature of the above proceedings, a registrant's personal appearance before his local board is in every sense an adjudication at which the registrant should be awarded traditional judicial safeguards. See *Hannah* v. *Larche*, 363 U.S. 420 (1960). In 50 U.S.C.A. App. § 460(b)(3) Congress has substantially insulated the factual determinations of local and appeal boards. Review of such determinations in a hearing at which counsel is present is restricted to habeas corpus after, or criminal prosecution for refusal of, induction. The scope of review is limited to the question whether there was any "basis in fact" for the classification assigned. While judicial review is thus substantially restricted, the decision of the local board obviously has a dramatic impact on the registrant's life and liberty.

It is contended that since a conscientious objector hearing is an inquiry into the registrant's state of mind, the presence of counsel would not only be of no assistance but, because of the probability that he would make vexatious objections to questions and testimony, counsel's presence would be to the registrant's disadvantage. It is unrealistic to assume that an attorney who is familiar with the very limited scope of judicial review available would do anything which would antagonize a local board or leave it with an impression other than one of complete candor. Also, the registrant will be more able to present his case if he is articulately represented by counsel.

Counsel will also act as a deterrent to possible abrupt or summary treatment of the registrant's claim (*Cf.*, *United States* v. *Wade*, 388 U.S. 218 (1967)). He may also bridge potential hostilities which result from the difference in ages between the board members (who are

between 30 and 75 years old, 32 C.F.R. § 1604.52(c), (d)) and the registrant. Through questioning or argument, counsel can clear up any inconsistencies or vagaries in the registrant's testimony before the board which, if uncorrected, might lead the board to decide against an otherwise qualified registrant. Counsel would be very familiar with the requisite statutes, regulations, and interpretative cases. The registrant may never have previously been required to articulate his beliefs and he may omit or confuse critical aspects of his beliefs. The presence of counsel would be crucial to leaving the board with a complete portrayal of the registrant's relevant beliefs. Finally, a brief summary by counsel may focus the board's attention on the elements of a conscientious objector claim and relate them to what the registrant has said, pointing out why the registrant should be believed. For a review of some of the difficulties encountered in passing on conscientious objector claims, see *United States* v. *Houghten*, 9th Cir. No. 23,556, June 19, 1969. All of the above roles are ones in which attorneys commonly operate, but with which a registrant is likely to have little familiarity. Of course, a registrant is always free to appear without counsel if he concludes that this would be to his advantage. Finally, a local board is not without power to terminate a hearing which is being unduly extended by counsel.

It could be argued that 32 C.F.R. § 1604.41, providing that "Advisors to registrants may be appointed . . . to advise and assist registrants in the preparation of questionnaires and other selective service forms and to advise registrants on other matters relating to their liabilities under the selective service law" supplies such procedural safeguards as to remove from 32 C.F.R. § 1624.1(b) the taint of doubtful constitutionality.[4] This does not follow.

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[4] 32 C.F.R. § 1604.71 provides as follows regarding these advisors (appeal agents):

> (c) Each government appeal agent and associate government appeal agent shall be, whenever possible, a person with legal training and experience.

[Footnote continued on page 41]

Even assuming that the appeal agent would be legally qualified, 32 C.F.R. § 1604.71(c), there is no provision for his appearance before the board except when the board so requests. 32 C.F.R. § 1604.71(d)(2).

Furthermore subsection (d)(5) injects such a conflict of interest[5] into any representation the appeal agent may provide that it is doubtful that he could act for the registrant in the role of an attorney.[6] He certainly cannot claim to represent the best interests of the registrant and still be in compliance with subsection (d)(5).

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[4] [Continued]

(d) It shall be the duty of the government appeal agent . . .

(1) to appeal . . . from any classification of a registrant by the local board which is brought to his attention and, in his opinion, should be reviewed by the appeal board.

(2) To attend such local board meetings as the local board may request him to attend.

(3) To suggest to the local board a reopening of any case where the interests of justice, in his opinion, require such action and to submit to the local board, with such suggestion, the information obtained by his investigation of the case which has caused him to arrive at his decision that the case should be reconsidered. . . .

(5) *To be equally diligent in protecting the interests of the Government and the rights of the registrant in all matters.* [Emphasis added.]

[5] In an August 20, 1968 letter, written at the direction of the Board of Governors of the State Bar of California by Staff Attorney Mary G. Wailes, to all members of the Bar serving as Government Appeal Agents, it was stated: "The Board wishes you to be advised, however, that in its opinion in acting as an appeal agent you may be exercising dual responsibilities that could put you in a position of representing conflicting interests."

[6] "To permit the inroad of a class of legal advisers being used as undisclosed informants for the Federal Government will confirm the suspicion and distrust with which some laymen approach full disclosure of their vital interests to their lawyers . . . . The ill-considered directive of General Hershey, already disavowed by government legal specialists, is clearly improper." *Lawyers Cannot be Informants*, 54 A.B.A.J. 153, 154 (1968).

Accordingly, this Court is loathe to hold that the administrative denial of such a right is either authorized by Congress or is constitutional.

The motion to dismiss is granted.

Dated: Sept. 19, 1969.

/s/ Robert F. Peckham
United States District Judge

[Filed Oct. 17, 1969, C. C. Evensen, Clerk]

CECIL F. POOLE
United States Attorney

COLEMAN BRESEE
Assistant United States Attorney
Attorneys for Appellant

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

Criminal No. 42614

UNITED STATES OF AMERICA, APPELLANT

v.

THOMAS WILLIAM WELLER, APPELLEE

NOTICE OF APPEAL

Notice is hereby given that the United States, plaintiff above, hereby appeals to the Supreme Court of the United States from the Order of the United States District Court for the Northern District of California entered on September 19, 1969, dismissing the captioned Indictment pursuant to defendant's pre-trial motion, said motion and order being made pursuant to Rule 12, Fed. R.Crim.P.

The Government certifies that this appeal is not taken for the purpose of delay and is not frivolous.

Respectfully submitted,

CECIL F. POOLE
United States Attorney

/s/ Coleman Bresee
COLEMAN BRESEE
Assistant United States Attorney

DATED: October 17, 1969.

SUPREME COURT OF THE UNITED STATES

No. 1082, October Term, 1969

UNITED STATES, APPELLANT

v.

THOMAS WILLIAM WELLER

APPEAL from the United States District Court for the Northern District of California.

The statement of jurisdiction in this case having been submitted and considered by the Court, further consideration of the question of jurisdiction is postponed to the hearing of the case on the merits and placed on the summary calendar.

March 23, 1970

JOURNAL ENTRY (March 23, 1970):

APPEALS—JURISDICTION NOTED OR POSTPONED

* * * *

No. 1082. United States, appellant, *v.* Thomas William Weller. Appeal from the United States District Court for the Northern District of California. The motion to remand is denied. Further consideration of the question of jurisdiction in this case postponed to the hearing of the case on the merits and case placed on the summary calendar.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1970 386110 740